STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 16, 2006
v	No. 257339 Wayne Circuit Court
THOMAS EDWARD GURK, Defendant-Appellant.	LC No. 04-000868-01

Before: Murray, P.J., and Cavanagh and Saad, JJ.

PER CURIAM.

Defendant appeals as of right his bench trial convictions for five counts of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced to 36 months to 15 years in prison. We affirm.

Defendant first challenges the constitutional adequacy of the information and his convictions because the five counts of CSC were not differentiated. This Court reviews an unpreserved constitutional claim for plain error that affects the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999). Defendant must show that "1) error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights. The third requirement generally requires a showing of prejudice, i.e., that the error affected the outcome of the lower court proceedings. It is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice." *Id*. at 763 (internal citations omitted).

Under *Carines*, a defendant must first show that a constitutional error occurred. *Carine*s, *supra* at 763. Defendant claims that his due process rights were violated because the victim did not differentiate each of the times defendant molested her. Rather, she described defendant's behavior and stated that it occurred five or six times while she was in fifth grade. Thus, defendant claims he was denied the opportunity to adequately defend himself against the charges and that he is at risk of being placed in double jeopardy.

"A defendant's right to adequate notice of the charges against the defendant stems from the Sixth Amendment, as applied to the states through the Due Process Clause of the Fourteenth Amendment." *People v Darden*, 230 Mich App 597, 600; 585 NW2d 27 (1998). An information provides adequate notice when it informs defendant of the charges he will have to defend against. *Darden, supra* at 600. In determining whether the time of the offense is

sufficiently specific in the information, the following factors are relevant: "(1) the nature of the crime charged; (2) the victim's ability to specify a date; (3) the prosecutor's efforts to pinpoint a date; and (4) the prejudice to the defendant in preparing a defense." *People v Naugle*, 152 Mich App 227, 233-234; 393 NW2d 592 (1986). "An information is presumed to be framed with reference to the facts disclosed at the preliminary examination." *People v Stricklin*, 162 Mich App 623, 633; 413 NW2d 457 (1987).

Considering the factors in sum, the information paired with the preliminary examination was constitutionally sufficient to place defendant on notice. *Naugle, supra at* 233-234. Even though the victim could not specify the exact dates of abuse, time is not an element of CSC. *Stricklin, supra* at 634. The prosecutor's effort to pinpoint exact dates was minimal, although the victim did state at the preliminary examination that she was in fifth grade; however, defendant's ability to prepare a defense was not prejudiced. A defendant's contention that he would have presented an alibi witness had he been provided the exact date is not persuasive. *Naugle, supra* at 234. Here, defendant testified and denied that any sexual contact took place. However, the trial court found the victim to be more credible. Defendant's counsel cross-examined witnesses, and defendant testified. His ability to defend himself was not prejudiced. Thus, defendant's due process rights were not violated, even though the victim did not link each of the times defendant molested her to distinct dates, and instead testified, during the preliminary examination and at trial, that defendant touched her vagina at least five times at defendant's house while she was in fifth grade.

Defendant relies on the decision in *Valentine v Koneth*, 395 F3d 626 (CA 6, 2005), to support his contention that his due process rights were violated. The *Valentine* Court measured the constitutional adequacy of the felony information against the standard the Supreme Court enunciated in *Russell v United States*, 369 US 749; 82 S Ct 1038; 8 L Ed 2d 240 (1962), which held that a federal indictment must: (1) contain the elements of the charged offense, (2) give the defendant adequate notice of the charges, and (3) protect the defendant against double jeopardy. *Valentine, supra at* 631. *Valentine* cited several circuit court cases to support its position that the standard the Supreme Court annunciated in *Russell* was applicable to state charging instruments. *Valentine, supra* at 631. However, our Supreme Court has recently rearticulated the principle that "[a]lthough lower federal court decisions may be persuasive, they are not binding on state courts." *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004). Thus, neither the standard used in *Valentine*, nor the holding, are binding on this Court. *Abela, supra* at 607.[1] Nonetheless, defendant asserts that his right to be free from double jeopardy has been violated by the lack of specificity in the information because he may be the subject of future prosecution for additional offenses occurring during that time period.

"The prohibition against double jeopardy provides three related protections: (1) it protects against a second prosecution for the same offense after acquittal; (2) it protects against a

[1] Moreover, the situation in *Valentine* was far different than that presented here. In *Valentine* the petitioner was charged with 40 separate crimes based on two incidents that occurred repeatedly, whereas defendant was charged with only five counts, one of which occurred in the basement and four of which occurred in his bedroom.

second prosecution for the same offense after conviction; and (3) it protects against multiple punishments for the same offense." *People v Nutt*, 469 Mich 565, 574; 677 NW2d 1 (2004). In *Nutt*, our Supreme Court noted:

> [T]he same-elements test, commonly known as the "*Blockburger* test," [*Blockburger v United States*, 284 US 299, 304; 52 S Ct 180; 76 L Ed 306 (1932)] is the well-established method of defining the Fifth Amendment term "same offense." The test, which has "deep historical roots," *United States v Dixon*, 509 US 688, 704; 113 S Ct 2849; 125 L Ed 2d 556 (1993), "focuses on the statutory elements of the offense. If each requires proof of a fact that the other does not, the *Blockburger* test is satisfied, notwithstanding a substantial overlap in the proof offered to establish the crimes." *Iannelli v United States*, 420 US 770, 785 n 17; 95 S Ct 1284; 43 L Ed 2d 616 (1975). [*Nutt, supra* at 576.]

We initially note that defendant's argument is premature, as he is not subject to a second prosecution for an event occurring during the same time period. Nonetheless, there is nothing in our Supreme Court's explanation of double jeopardy protection that prohibits a prosecutor from bringing an additional CSC charge against defendant, if, in the future, the victim remembered a different incident which occurred during or outside the same time period. The *Nutt* Court specifically rejected the proposition that double jeopardy protection requires the prosecution "to join at one trial all the charges against a defendant that grow out of a single criminal act, occurrence, episode, or transaction." *Nutt, supra* at 578 n 14 (citation omitted). Thus, defendant's contention that his convictions for five counts of CSC II, based on the victim's testimony, places him at risk of being in double jeopardy in the future is unsupported.

Defendant has failed to show that the information or his convictions for five counts of CSC II violated any of his due process rights because the information, paired with the preliminary examination, provided him with constitutionally adequate notice of the charges against him and his convictions do not place him at risk of being in double jeopardy. Thus, he has failed to show an error occurred at the trial court, and is unable to meet the first prong of *Carine*s, *supra* at 763. Therefore, defendant is not entitled to have his convictions vacated because he failed to show constitutional error.[2]

Defendant also claims that his sentences violate his rights under the Sixth Amendment, pursuant to the Supreme Court's holdings in *United States v Booker*, 543 US 220; 125 S Ct 738; 160 L Ed 2d 621 (2005), *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and *Apprendi v New Jersey*, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). We disagree. The proper construction or application of statutory sentencing guidelines presents a question of law that is reviewed de novo. *People v Houston*, 261 Mich App 463, 471; 683 NW2d 192 (2004).

[2] Additionally, given the strong evidence and credibility determination made by the trial court, even if there was plain error, it did not affect defendant's substantial rights. *Carines*, *supra*.

In his brief on appeal, defendant asserts that no points should have been scored under OV 4[3], OV 10[4] or OV 13[5] because "the factfinder did not need to find, and did not find, beyond a reasonable doubt, any of the factors underlying [the OVs]." Defendant contends that the United States Supreme Court decisions in *Booker, Blakely* and *Apprendi* control the outcome of his case because the facts used to score OV 4, OV 10 and OV 13 were not proven beyond a reasonable doubt or admitted by defendant. However, in *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004), our Supreme Court held that the Michigan sentencing guidelines system was unaffected by the holding in *Blakely* because the scheme in *Blakely* was designed to protect the defendant from a higher sentence based on facts not found by the jury or admitted by the defendant in violation of the Sixth Amendment. The Court found, in contrast to the scheme in *Blakely*, that Michigan has an indeterminate sentencing system in which the defendant is given a sentence with a minimum and a maximum and that maximum is not determined by the trial judge but is set by law. *Id.*

Additionally, the United States Supreme Court's holding in *Booker* does not affect Michigan's sentencing scheme. *Booker* dealt with the federal sentencing scheme, which is a determinate sentencing scheme like the one addressed in *Blakely*, and unlike Michigan's indeterminate sentencing scheme. Because *Booker* addressed a determinate sentencing scheme, the holding does not apply to our indeterminate sentencing scheme. *Claypool*, *supra* at 730-731 n 14. Therefore, defendant's argument that Michigan's sentencing system is unconstitutional fails.

Affirmed.

/s/ Christopher M. Murray
/s/ Mark J. Cavanagh
/s/ Henry William Saad

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[3] Under MCL 777.34(1)(a), the trial court may score OV 4 at 10 points when, "Serious psychological injury requiring professional treatment occurred to a victim."

[4] Under MCL 777.40(1)(b), the trial court may score OV 10 at 10 points when "The offender exploited a victim's physical disability, mental disability, youth or agedness, or a domestic relationship, or the offender abused his or her authority status."

[5] Under MCL 777.43(1)(b), the trial court may score OV 13 at 25 points when, "The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person."